decision also affirms the longstanding position of the U.S. Environmental Protection Agency ("EPA") and the State of Colorado Water Quality Control Division, the agencies with regulatory oversight of water quality, that "owners or operators" of points sources are subject to regulation. This Court should not upset the settled expectations of the public, the regulated industries, and these agencies by granting certiorari in this case and deciding these issues yet again.

Since the Clean Water Act discharge permitting requirement is triggered by ownership of a polluting point source, and not mere ownership of land, as the Tenth Circuit and district courts recognized, the statistics Petitioner cite about the number of abandoned mining sites located around the country are not meaningful concerning the potential effects of the Tenth Circuit's decision.

ARGUMENT

A. There Is No Split In The Circuits With Regard To The Elements Of Liability Under Section 402 Of The Clean Water Act, As The Tenth Circuit Correctly Found.

Petitioner's principal argument for this Court to grant certiorari in this case is that "the circuits are divided over the fundamental scope of the NPDES program." Petition at 9. However, Petitioner cannot demonstrate any such split in the circuits. In arguing that such a split exists, Petitioner cites to only one case, *Froebel v. Meyer*, 217 F.3d 928 (7thCir. 2000), *cert. denied*, 531 U.S. 1075 (2001), and contends that decision in *Froebel* is directly in conflict with

the Tenth Circuit's determination in this case. Petition at 11.

Contrary to Petitioner's claims, the Tenth Circuit's decision below and *Froebel* are not at odds, as the Tenth Circuit carefully considered this argument and found *Froebel* unpersuasive for three reasons and further distinguished *Froebel* on its facts. (App. at 21).

First, the Court held that *Froebel* interpreted Section 404 of the Clean Water Act, and not Section 402. (App. at 21). Section 402, the Tenth Circuit held, addresses the "discharge of any pollutant," whereas Section 404 addresses the "discharge of dredged or fill material." (App. at 21-22).

Second, the Court held Section 402 focuses on the point source and its ownership, while Section 404 emphasizes the "activity" giving rise to the discharge of dredged material, which further distinguishes the two sections. (App. at 22).

Finally, the Court held, the term "discharge of any pollutant" that appears in Section 402 must be understood as defined elsewhere in the Act, where the term "point source" is used to define "discharge" and give context to the term "addition" in the statute. (App. at 22-23). Thus, the Court concluded correctly that "if the point source is 'discharging,' the 'person' who owns or operates the point source is liable under the Act." (App. at 22).

Additionally, the Court noted that in *Froebel* the court held that the removed dam was not a point source. Here, by contrast, El Paso has conceded that its shaft is a point source. (App. at 22-23).

On these points, the Tenth Circuit ruling was thoughtful, reasonable and correct. Unlike Section 402, Section 404, applicable to the "discharge of dredged or fill material," 33 U.S.C. § 1344(a), clearly imposes an "activity" requirement as a condition of permitting. *See,* 33 U.S.C. § 1344(e)(1) (applies to categories of "activities") and 33 U.S.C. § 1344(f) (listing exempted "activities"). The same is true of the implementing regulations for Section 404. *See* 33 C.F.R. § 322.3 (listing "activities" requiring permits); 33 C.F.R. § 322.4 (listing "activities" not requiring permits); 33 C.F.R. § 323.2(f) (listing the type of "activities" included within the definition of "discharge of fill material"). Thus, the plain language of the CWA and its implementing regulations indicate that Section 402 and Section 404 permits are based on different triggering conditions.

The Tenth Circuit recognized that the term "discharge" broadly applies to both Section 402 and 404 of the Act. (App. at 21). However, an obvious explanation for the different statutory language in the two sections is that Section 404 was added to the original Clean Water Act bill as an amendment to preserve a pre-existing permit program of the Army Corps of Engineers. *See Kentuckians for the Commonwealth, Inc. v. Rivenburgh,* 204 F.Supp.2d 927, 933-35 (S.D.W.Va. 2002), *rev'd on other grounds,* 317 F.3d 425 (4thCir. 2003). Where an agency interpreting similar statutory terms differently provides a reasonable explanation for the difference, courts will uphold the construction. *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs,* 260 F.3d 1365, 1379-80 (Fed.Cir. 2001).

Froebel also involves application of the CWA to dam structures, which raise the unique question whether

pollutants from dams were being added from the "outside world." *See National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6thCir. 1988); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C.Cir. 1982). This case, however, is not a "dam" case.[1]

Thus, in numerous respects, there is no conflict between the decision in this case and the Seventh Circuit's decision in *Froebel*, as the Tenth Circuit correctly found.

B. There Is No Statutory Or Regulatory Basis For A "Passive Landowner" Exemption To Clean Water Act Liability.

Petitioner argues further that "passive property owners" (i.e. those that own discharging point sources, but did not construct those sources) should be exempt from Clean Water Act liability. Petition at 10. However, there is

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[1] "In several policy statements made in opinion letters and reports to Congress in the 1970s and 1980s, the EPA took the position that dam releases should not be considered "discharges" under the CWA and thus NPDES permits would not be required for those releases. *See Gorsuch*, 693 F.2d at 167-69. This position was never formalized in a notice-and-comment rulemaking or formal adjudication under the Administrative Procedure Act, 5 U.S.C. §§ 553, 554, although the EPA subsequently reiterated its position in the *Gorsuch* and *Consumers Power* cases, as a defendant and amicus curiae, respectively. *See Consumers Power*, 862 F.2d at 583; *Gorsuch*, 693 F.2d at 165. Both courts rested their decisions on the conclusion that the EPA position deserved substantial deference and was reasonable. Given subsequent Supreme Court decisions governing judicial deference to federal agencies' constructions of the statutes that they implement, we hold that the EPA position is due less deference than that accorded it by the *Gorsuch* and *Consumers Power* courts."

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 489-490 (2dCir. 2001) (footnote omitted).

no basis for any such exemption in the Clean Water Act. Section 301 of the CWA states, "[e]xcept as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). Section 402 of the CWA, which establishes the NPDES permit system, provides that any discharge of any pollutants must be authorized by an NPDES permit. 33 U.S.C. § 1342. The term "discharge of pollutants" is defined as "***any*** addition of ***any*** pollutant to navigable waters from ***any*** point source." 33 U.S.C. § 1362(12) (emphasis added).

The requirement that all discharges covered by the CWA have an NPDES permit "is unconditional and absolute." *United States v. Tom-Kat Development, Inc.*, 614 F.Supp. 613, 614 (D.Alaska 1985). Importantly, the courts are consistent in their recognition that the CWA is a strict liability statute. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 374 (10thCir. 1979).

Lacking support in the statute itself, Petitioner contends that "[e]very reported case imposing CWA permit liability has found that the discharge resulted from some affirmative conduct by the defendant." Petition at 11. However, Petitioner ignores the fact it has not found *a single case in which an "active conduct" or "mere landowner" defense has been sustained in a case under Section 402 of the CWA*. The Tenth Circuit correctly stated that: "[P]oint source owners such as El Paso can be liable for the discharge of pollutants occurring on their land, whether or not they acted in some way to cause the discharge." (App. at 23).

Furthermore, holding "owners or operators" liable under the Clean Water Act, rather than the person or persons who constructed a point source, is a very reasonable, common-sense approach. The person or persons who construct a point source but then sell the property generally no longer have access to the property in order to prevent further discharges or do the monitoring and control associated with the permitting process. Owners and operators, however, generally do have the necessary access and control. This would be especially true of any gravity-flow point source that requires no affirmative "operation," such as mine drainage tunnels which are commonplace in mining districts in the western United States. It is important to note that the term "point source" specifically includes the terms "tunnel" and "pipe" which are often gravity-flow conveyance systems requiring little or no operation after initial construction. 33 U.S.C. § 1362(14).

Additionally, it would not carry out the intent of the Clean Water Act to set up administrative agencies to undertake the difficult task of judging what is sufficient "activity" to require a person to obtain a permit, or having to defend lawsuits from polluters who say their "activity" was insufficient in this or that instance. It is well established that the CWA is not interpreted in such a way as to impose difficult administrative burdens on the regulatory agencies. *Costle v. Pacific Legal Foundation,* 445 U.S. 198, 215 (1980).

In contrast to Petitioner's claim, there is well-settled case law concluding that point source discharges of pollutants from mines must be authorized by an NPDES permit, even where the mining is inactive and the pollution is discharged from historic mining features. In *American*

Mining Congress v. U.S. EPA, 965 F.2d 759, 764 (9thCir. 1992) ("*AMC*"), the mining industry presented the same arguments currently being advanced by Petitioner against an EPA regulation requiring inactive mines to obtain NPDES permits for stormwater discharges – namely that the CWA does not impose NPDES permitting requirements on owners of inactive mines. The Ninth Circuit rejected these arguments and ruled that, "[a]ll point sources that discharge pollutants, including point sources that discharge pollutants from inactive mines, require a permit." *AMC*, 965 F.2d at 767.

In the Clean Water Act, Congress provided that effluent limitations "shall be applied to *all* point sources of discharges of pollutants in accordance with the provisions of this Act." 33 U.S.C. § 1311(e) (emphasis added). The statutory language used consistently throughout the CWA, as both the district court and Tenth Circuit recognized, demonstrates the intent of Congress that the point source permitting provisions apply to "owners or operators" of facilities and point sources. *See* 33 U.S.C. §§ 1311(c) ("owner or operator" of point sources employing best available technology); 1311(g)(2) and (3) ("owner or operator" of point sources with nonconventional pollutant control); 1311(i)(2)(A) ("owner or operator" of point sources where construction of publicly owned treatment works delayed); 1311(m)(1)(I) (dischargers to deep water territorial seas eligible for modification if "owner or operator" of comparable facility not put at competitive disadvantage); 1311(n) (alternative effluent limitations available to "owner or operator" of facility); 1312(b)(2)(B), (modifications of toxic pollutant limitations available within economic capability of "owner and operator of the source");

1317(e) (owner or operator of public treatment works may obtain extension for pretreatment standards); 1318(a) (record keeping requirements of "owner or operator of any point source") (App. at 19, 57-58). Thus, liability attaches to any "owner" of a point source from which discharges of pollution are ongoing.

Petitioner's argument is based solely on what it characterizes as the plain and ordinary meaning of the terms "discharge," "permit" and "addition." Petition at 16. However, this argument fails to account for other terms in the statute, including Congress' use of the term "any" to describe "addition" and the use of the terms "owners or operators" in various locations throughout the statute to refer to parties responsible for point source discharges.

It is a "cardinal rule" of statutory construction that "a statute is to be read as a whole." *Washington State Dep't of Social and Health Services v. Guardianship Estate of Keffeler,* 537 U.S. 371, 384, n.7 (2003). Petitioner's argument is based solely on its dubious characterization of three statutory terms taken out of context from other relevant terms in the same statute and its sensational but unfounded claims of harm to "passive landowners."[2]

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[2] The terms "discharge" and "any addition" do *not* by their plain meaning connote activity as Petitioner contends but more broadly apply regardless of any activity in creating the discharge. For example, as recognized in *Broderick Investment Co. v. Hartford Accident & Indemnity Co.*, 954 F.2d 601, 607, n.4 (10thCir. 1992), the term "discharge" is flexible enough in the context of pollution that it could have "many possible definitions." The dictionary defines "addition" to include not only the "act" of adding, but also the "process" of adding, and the term "process" has passive as well as active meanings. *Webster's Third New International Dictionary*, p.1808 (1961) (*e.g.*, definition b: "continued onward flow").

Petitioner also ignores EPA's statutory role of enacting regulations necessary to carry out the Act, 33 U.S.C. § 1361(a), and statutory control over NPDES permitting. 33 U.S.C. § 1342. In carrying out these functions, EPA more than two decades ago adopted regulations defining "discharge of pollutant" to include "additions of pollutants into waters of the United States from: . . . discharges through pipes, sewers, or other conveyances ***owned by a . . . person*** which do not lead to a treatment works." 40 C.F.R. § 122.2 (emphasis added); 44 Fed.Reg. 32854, 32901 (June 7, 1979). Moreover, the terms "facility or activity" mean "any NPDES 'point source' ***or*** any other facility ***or*** activity (***including land or appurtenances thereto***) that is subject to regulation under the NPDES program." 40 C.F.R. § 122.2 (emphasis added); 48 Fed.Reg. 14146, 14156 (April 1, 1983). The term "owner or operator" is also defined as "the ***owner or*** operator of any 'facility or activity' subject to regulation under the NPDES program."[3] 40 C.F.R. § 122.2 (emphasis added); 48 Fed.Reg. at 14156. *See also, Beartooth Alliance v. Crown Butte Mines*, 904 F.Supp. 1168, 1175 (D.Mont. 1995) ("*Beartooth*").

In interpreting the CWA, it is well established that EPA's interpretation of this "very complex statute" is entitled to "considerable deference." *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). EPA's regulations – adopted after public notice and comment – are "given controlling weight

[3] Since EPA's regulations apply in the Seventh Circuit as well as the Tenth, there is no basis for Petitioner's statement that: "If El Paso's property were located in the Seventh Circuit, it would not be required to obtain a NPDES permit under the circumstances of this case." Petition at 22.

unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

Petitioner also ignores the fact that the Clean Water Act is a strict liability statute. As such, equitable defenses are not relevant to a liability determination. *See State of Georgia v. City of East Ridge*, 949 F.Supp. 1571, 1579, n.7 (N.D.Ga. 1996) ("minimal adverse impact to the affected waters" is irrelevant); *Student Public Interest Research Group of New Jersey, Inc. v. P.D. Oil & Chemical Storage, Inc.*, 627 F.Supp. 1074, 1085 and 1090 (D.N.J. 1986) ("laches," "good faith" and "intent" of polluter are also irrelevant to the issue of liability); *United States v. Amoco Oil Co.*, 580 F.Supp. 1042, 1050 (W.D.Mo. 1984) ("good-faith" defense not available). Thus, Petitioner's attempted equitable arguments are not relevant to a judgment on liability, and instead are pertinent only to the issue of remedy (civil penalty and injunctive relief). *E.g.*, *Amoco*, 580 F.Supp. at 1050.

The so-called "innocent landowner" exemptions that Petitioner cites in other statutes involve exemptions from liability for pollution spills, not exemptions from a permitting process. Petition at 18.

Furthermore, exempting parties such as the Petitioner from any liability under the Act or even the requirement to obtain a permit would undermine the Act's ability to achieve its goal of eliminating the "discharge of pollutants into the navigable waters" of the United States. 33 U.S.C. § 1251. Petitioner itself admits that there are a multitude of inactive mine sites discharging pollution from

point sources into waters of the U.S. Should all these mine sites be exempt from the Act, it would all but guarantee that those affected water bodies would never meet water quality standards, as there would be no mechanism for ensuring their cleanup.[4]

Petitioner also mounts the unsupported argument that because it owned the point source prior to the enactment of the Clean Water Act, the Act should not apply to its property. Petition at 19. There is no support for the contention that the Clean Water Act was not intended to affect pre-existing polluting point sources. Congress clearly intended that point source discharges existing at the time the Act was passed be permitted. Under 33 U.S.C. § 1342(k), Congress provided a limited 180-day period after enactment of the CWA in which existing point source discharges would not be in violation if a permit application were filed. That opportunity for El Paso to avoid prosecution expired approximately three decades ago.

Lastly, Petitioner asserts that the Tenth Circuit's holding in this case will undermine Congressional efforts to enact "Good Samaritan" legislation aimed at encouraging clean up of abandoned mine sites. Petition at 21. This

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[4] Petitioner cites to federal government data portraying a large number of inactive mine sites with contaminated material that may "pose potential risks to human health . . . " Petition at 20. However, none of this data indicates the extent to which any of these mine sites are discharging pollution from point sources into navigable waters, the trigger for liability under the Clean Water Act. Without this specific information, there is no way to determine the relevance of the numbers of inactive mine sites cited by Petitioner. As such, these data fail to demonstrate any major impact associated with Petitioner being liable for discharges from a polluting point source located on its property.

argument is not only wholly speculative, but also represents a failure to understand the purpose of any such legislation. Indeed, the entire premise for such legislation is to give third parties who do not have an interest in the property containing a polluting mine site protection from liability for efforts to remedy ongoing discharges. In this way, these types of bills expressly recognize that Clean Water Act liability applies exactly as set forth by the Tenth Circuit.

Moreover, the specific legislation cited by Petitioner makes it clear that current owners of discharging point sources are not eligible for "Good Samaritan" status. This is because the purpose of this bill is not to provide an escape from liability for those who are already subject to this liability, but for those who would be willing to clean up the site but for that liability.

For Petitioner's role, it has taken no steps whatsoever to clean up the polluting discharge, despite having been found expressly liable by the district court in this case and by the State of Colorado in administrative proceedings. It strains credibility that Petitioner would somehow act to clean up the existing pollution if the "Good Samaritan" bill even passes, even though it would not do so under court order.

C. There Is No Exception To Clean Water Act Liability For Point Sources With Multiple Contributors, An Issue Which Was Not Raised Or Decided Below And Therefore Is Not Before This Court.

Petitioner argues that "the citizen suit is an inappropriate mechanism for adjudicating liability for alleged

point source discharges that have multiple sources." Petition at 8. Petitioner also argues that Sierra Club and Mineral Policy Center "have abused the citizen suit process" and exceeded the useful rule of "supplementing" government enforcement efforts under the Clean Water Act. Petition at 29-30.

First, these charges are incorrect. Sierra Club and Mineral Policy Center gave sixty day notice to El Paso and the government prior to commencing their action in U.S. District Court. Neither El Paso nor the government took any action to address the sixty day notice letter during the notice period. Thus, Sierra Club and Mineral Policy Center complied with all prerequisites for filing a citizen enforcement action. Neither government agency took any action against El Paso until years after this citizen enforcement action was commenced. Second, whatever their merits, these arguments were not raised and ruled upon by either the district court or the Tenth Circuit Court of Appeals, so they are not properly before this Court.

The only support for Petitioner's claim is that "the use of citizen suits may lead to inconsistent rulings in multiple administrative and judicial forums." Petition at 8. However, the current status of this case itself demonstrates the speculative nature of this assertion, as the very state administrative action to which Petitioner points to in support has been stayed, by agreement of all the parties including Petitioner, pending the resolution of this appeal. Since neither this case nor the state administrative case is final, it is quite a stretch to assert that the cases will reach inconsistent results.

Petitioner's position also fails to recognize the importance of citizen suits in the Clean Water Act's statutory scheme. In enacting the Clean Water Act, Congress granted jurisdiction to the United States district courts to hear citizen suits enforcing the requirements of the Act. 33 U.S.C. § 1365(a). Congress intended that citizen suits would serve "an integral part of [the Clean Water Act's] overall enforcement scheme." *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F.Supp. 1389, 1402 (D.Haw. 1995). Congress also intended that Clean Water Act suits be "handled liberally, because they perform an important public function." *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9thCir. 1987). Here, Petitioner's arguments were not properly raised and decided and presented now for review; even if they were, its argument that citizen suits are "inappropriate" flies in the face of Congress' intent in expressly providing for such suits in the Clean Water Act. Notably, Petitioner fails to cite any authority, be it case law or otherwise, that supports an exemption from citizen suits in this context.

D. The Tenth Circuit Properly Applied This Court's Ruling In *Gwaltney v. Chesapeake Bay Foundation.*

Petitioner argues that jurisdiction in this case is improper because, as a matter of law, there can be no allegation of "a state of continuous or intermittent violation" of the Clean Water Act. Petition at 23. The sole fact cited in support of this argument is that the point sources in this case, the El Paso Shaft and Roosevelt Tunnel, were constructed wholly in the past. *Id.* at 28. However, this

position ignores the undisputed fact that the El Paso Shaft and Roosevelt Tunnel continue to collect and convey pollutants into navigable waters on an ongoing basis. It is this ongoing discharge from a point source that is the focus of the Clean Water Act liability in this case, not the fact that the conveyance structures were constructed in the past. The Tenth Circuit correctly focused on the key issue: "Thus, since plaintiffs have alleged the **contemporaneous discharge** from a point source – the El Paso shaft – which flows through other conveyances to navigable waters, CWA jurisdiction is established." (App. at 14) (emphasis added).

In proving an "ongoing" violation of the CWA, it is sufficient to show that there is a "reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987). "Intermittent or sporadic violations do not cease to be ongoing until the date when there is no real likelihood of repetition." *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 693 (4thCir. 1989); *see also Committee to Save the Mokelumne River v. East Bay Mun. Util. Dist.*, 35 ERC 1537, 1551 (E.D.Cal. 1992). "[A] discharge of pollutants is ongoing if the pollutants continue to reach navigable waters, even if the discharger is no longer adding pollutants to the point source itself." *Umatilla Waterquality Protective Ass'n, Inc. v. Smith Frozen Foods, Inc.*, 962 F.Supp. 1312, 1322 (D.Ore. 1997); *see also Werlein v. United States*, 746 F.Supp. 887, 896-897 (D.Minn. 1990) (violations are "ongoing" when there is "toxic waste that has not yet reached a waterway, but is being introduced

into the waterway over time"). In *Beartooth,* also involving an inactive mine, the court "found evidence that violations were occurring at New World after the complaint was filed" and thus rejected the defendant's claim that the unpermitted discharges were "wholly past" violations. *Beartooth*, 904 F.Supp. at 1176. In support of its legal argument, Petitioner cites to several cases it had argued below where an "ongoing violation" was not found to have been alleged because the actual discharge had occurred wholly in the past, and all that remained to occur was the migration of that pollution to a navigable water. Petition at 25-27. The Tenth Circuit correctly distinguished these cases and rejected Petitioner's arguments, saying:

> "In contrast, this case does not involve the mere migration, decomposition, or diffusion of pollutants from an identifiable discharge that occurred sometime in the past. That the mine shaft itself is a point source is not reasonably contestable. Here, the discharge from the point source is occurring now, and is not the result of some past discharge that occurred on the surface of El Paso's property."

(App. at 13).

Petitioner cites "confusion" in the law on this point as a reason for this Court to grant certiorari, (Petition at 24), and the Tenth Circuit itself did recognize some potential disagreement in the cases. (App. at 10-12). However, regardless of which test used in the federal courts is applied, as the Tenth Circuit correctly held, there is *still* subject matter jurisdiction here under the *Gwaltney* test. Thus, this case is not a useful and appropriate one for this

Court to interpret any confusion that may allegedly exist in published cases.

CONCLUSION

This case is not the type of case this busy and important Court should select for review. Despite Petitioner's attempt to manufacture one, there is no split in the Circuit Courts. The Tenth Circuit's decision is squarely in line with precedent from numerous federal district and appellate courts across the country. Further, the decision comports with long-standing legal interpretations, and practical implementation, of the Clean Water Act by the U.S. EPA and state agencies.

When the Tenth Circuit's basis for its decision is fully and fairly considered, there is no "new and expansive" interpretation of the Act at issue. Petitioner's arguments have been considered by five separate decision-makers including nine separate judges and have been rejected each time. The case arrives here on only a limited summary judgment record. The alleged effect on large numbers of property owners is speculative at best because it ignores the basis of the Court's decision which limits its effects. Lastly, the decision fully and faithfully implements the intent of Congress in passing the Clean Water Act. Moreover, granting certiorari would only lead to further delays – beyond the four years of delay already – in properly permitting ongoing discharges at the site in contravention of the purpose of the Act.

Therefore, the Sierra Club and Mineral Policy Center respectfully request that Petitioner's Petition for Certiorari be denied in all respects.

Respectfully submitted,

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Dated this 27th day of February, 2006

(3)

No. 05-933

In The Supreme Court of the United States

EL PASO PROPERTIES, INC.,

Petitioner,

v.

SIERRA CLUB AND
MINERAL POLICY CENTER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF NORTHWEST MINING ASSOCIATION, COLORADO MINING ASSOCIATION, AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONER

COME NOW, Northwest Mining Association ("NWMA"), Colorado Mining Association ("CMA"), and Mountain States Legal Foundation ("MSLF") and hereby respectfully move, pursuant to Supreme Court Rule 37, for leave to file the accompanying *amici curiae* brief in support of Petitioner. Petitioner has granted consent to *amici* for the filing of the *amici* brief. However, Respondents denied consent because MSLF would not agree to allow Respondents to review the attached *amici curiae* brief prior to the filing thereof.

NWMA is a non-profit, non-partisan, trade association organized under the laws of the State of Washington, with its principal place of business in Spokane, Washington. NWMA was founded in 1895 by miners from the States of Idaho, Montana, and Washington, as well as several Canadian provinces. NWMA currently has 1,300 members residing in 31 States and 6 Canadian provinces. NWMA's purposes are: (1) to support and advance mineral resource and related industries; (2) to represent and inform members on technical, legislative, and regulatory issues; (3) to provide for the dissemination of educational material related to mining; and (4) to foster and promote economic opportunity and environmentally responsible mining.

CMA is the oldest mining trade association in the United States. Founded in 1876 and incorporated in 1897, CMA promotes the mining industry's interests before governmental agencies and the general public. Its membership includes more than 600 persons and organizations engaged in mineral exploration and development, as well as those who provide services to the mining industry,

including equipment manufacturers, bankers, law, consulting, engineering, and accounting firms. CMA's interest in this case is in defining the appropriate limits of Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, liability for mineral producers by ensuring that CWA liability is defined appropriately and consistently in §§ 402 and 404 of the CWA for the purpose of developing future mining projects.

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF is dedicated to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. The issue in this case is whether the CWA imposes liability on the owner of property for the unpermitted "discharge of a pollutant" when the owner did nothing more than simply own the property. Since its establishment in 1977, MSLF has been active in litigation aimed at ensuring the proper interpretation and application of the CWA. *E.g.*, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (*amicus curiae*); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (represented intervenor); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001) (represented plaintiff); *Rapanos v. United States*, Nos. 04-1034 and 04-1384 (2006) (*amicus curiae*). In addition, MSLF has over 5,000 members throughout the United States. Hundreds of these members own property in Colorado, Wyoming, Utah, New Mexico, Oklahoma, and Kansas.

The outcome of this case may have serious consequences for these members. Indeed, if the decision below is allowed to stand, all persons owning property within the

jurisdiction of the Tenth Circuit, including members of *amici*, may be subject to liability under the CWA for doing nothing more than owning a piece of property. *Amici* believe that the accompanying *Amici Curiae* Brief will assist this Court.

WHEREFORE, NWMA, CMA, and MSLF respectfully move for leave to participate in this case as *amici curiae* and to file the accompanying *Amici Curiae* Brief.

DATED this 27th day of February, 2006.

Respectfully submitted by:

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Northwest Mining Association ("NWMA") is a non-profit, non-partisan, trade association organized under the laws of the State of Washington, with its principal place of business in Spokane, Washington. NWMA was founded in 1895 by miners from the States of Idaho, Montana, and Washington, as well as several Canadian provinces. NWMA currently has 1,300 members residing in 31 States and 6 Canadian provinces. NWMA's purposes are: (1) to support and advance mineral resource and related industries; (2) to represent and inform members on technical, legislative, and regulatory issues; (3) to provide for the dissemination of educational material related to mining; and (4) to foster and promote economic opportunity and environmentally responsible mining.

Colorado Mining Association ("CMA") is the oldest mining trade association in the United States. Founded in 1876 and incorporated in 1897, CMA promotes the mining industry's interests before governmental agencies and the general public. CMA membership includes more than 600 persons and organizations engaged in mineral exploration and development, as well as those who provide services to the mining industry, including equipment manufacturers, bankers, law, consulting, engineering and accounting firms. CMA's interest in this case is in

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[1] Petitioner has consented to the filing of this brief. Respondent did not consent, and a motion for permission to file this *amici curiae* brief precedes this brief.

In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authored this brief, in whole or in part, and that no person or entity, other than *amici curiae* and their members, made a monetary contribution for the preparation or submission of this brief.

defining the appropriate limits of Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, liability for mineral producers by ensuring that CWA liability is defined appropriately and consistently in Sections 402 and 404 of the CWA for the purpose of developing future mining projects.

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited and ethical government, and the free enterprise system. Since its establishment in 1977, MSLF has been active in litigation aimed at ensuring the proper interpretation and application of the CWA. *E.g.*, *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (*amicus curiae*); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) (represented intervenor); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001) (represented plaintiff); *Rapanos v. United States*, Nos. 04-1034 and 04-1384 (2006) (*amicus curiae*). In addition, MSLF has over 5,000 members throughout the United States. Hundreds of these members own property in Colorado, Wyoming, Utah, New Mexico, Oklahoma, and Kansas.

The Tenth Circuit's decision may have serious consequences for members of these organizations. Indeed, if the Tenth Circuit's interpretation of the CWA is allowed to stand, all persons owning property within its jurisdiction, including members of NWMA, CMA, and MSLF, may be subject to liability under the CWA for doing nothing more than owning a piece of property. Because *amici* seek to ensure that the CWA is interpreted and administered in accordance with Congress's intent, they respectfully

submit this *Amici Curiae* Brief in support of Petitioner, El Paso Properties, Inc., urging the Court to grant the Petition for *Writ* of *Certiorari*.

SUMMARY OF ARGUMENT

The U.S. Supreme Court should grant the Petition for *Writ* of *Certiorari* for the following reasons. First, the Tenth Circuit violated this Court's well-established principles of statutory construction. Second, the Tenth Circuit's decision creates new liability for the federal government under the Clean Water Act.

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT FAILED TO FOLLOW ESTABLISHED SUPREME COURT PRECEDENT GOVERNING STATUTORY INTERPRETATION.

A. The Tenth Circuit Failed To Interpret The Clean Water Act According To The Legislative Purpose As Expressed By The Ordinary Meaning Of The Words Used.

Section 402 of the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387, establisnes a national pollutant discharge system ("NPDES") and directs the Environmental Protection Agency ("EPA") to issue NPDES permits for the "discharge of any pollutant." 33 U.S.C. § 1342(a)(1). Section 301 of the CWA makes it unlawful for "any person" to discharge a pollutant without a Section 402 permit. 33 U.S.C. § 1311(a) ("Except as in compliance with [Section 402], the discharge of any pollutant *by any person* shall be unlawful.") (emphasis added). Congress expressly defined

"discharge of a pollutant" as "any *addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis added). Thus, pursuant to Congress's intent, the permit requirement in Section 402 is triggered only when: (1) a person; (2) adds; (3) a pollutant; (4) to navigable waters; (5) from a point source.

In interpreting a statute, a court must give effect to the intent of Congress. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982). The first place to look for that intent is the language of the statute itself. *Lewis v. U.S.*, 445 U.S. 55, 60 (1980). When looking at the language of the statute, a court must assume that the "legislative purpose is expressed by the *ordinary meaning* of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962) (emphasis added); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning"). Applying these well-established principles of statutory construction to the statute in this case reveals that when Congress passed the CWA it intended to regulate only "active conduct" by a "person" that results in a "discharge of a pollutant."

The "ordinary meaning" of the word "addition" is "the *act* or *process* of adding." *The Merriam-Webster Dictionary* (1977) (emphasis added); *Webster's New Collegiate Dictionary* (1981). Thus, the "ordinary meaning" of the word "addition" indicates that some form of "active conduct" is required to trigger the permit requirement of Section 402.

It is undisputed that, in this case, Petitioner did not construct the mine or point source at issue. *See* Petitioner's Brief at 3. Petitioner has never conducted mining operations on this property and has never held a mining or